IN THE

Supreme Court of the United States

October Term 1977
No. 8, Original of
October Term 1965

STATE OF ARIZONA,

Complainant,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, and COUNTY OF SAN DIEGO,

Defendants,

UNITED STATES OF AMERICA and STATE OF NEVADA,

Interveners,

STATE OF NEW MEXICO and STATE OF UTAH,

Impleaded Defendants.

Response of the States of Arizona, California, and Nevada and the Other California Defendants to the Motion for Leave to Intervene as Indispensable Parties, Filed by the Fort Mojave Indian Tribe, the Chemehuevi Indian Tribe, and the Quechan Tribe of the Fort Yuma Indian Reservation and Joined by the National Congress of American Indians as Amicus Curiae.

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January 25, 1978

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STATE OF ARIZONA, Complainant, the California Defendants (STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY

COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, COUNTY OF SAN DIEGO) and STATE OF NEVADA, Intervener (hereinafter referred to collectively as the "State parties"), hereby oppose the Motion for Leave to Intervene as Indispensable Parties filed by the Fort Mojave Indian Tribe, the Chemehuevi Indian Tribe, and the Quechan Tribe of the Fort Yuma Indian Reservation (hereinafter referred to as the "applicant Indian Tribes" or "applicants") and joined in by the National Congress of American Indians as Amicus Curiae. The State parties contend that the Motion for Leave to Intervene should be denied and that proceedings toward carrying out this Court's mandate under Article VI of the 1964 Decree in this matter should be allowed to continue between the existing parties.

I

INTRODUCTION.

At the threshold, the applicant Indian Tribes should not be allowed to intervene because intervention would constitute a suit against the States of Arizona, California, and Nevada without their necessary consent. Furthermore, the applicant Indian Tribes do not qualify to intervene as a matter of right or for permissive intervention under the applicable rules. Intervention should be denied.

This matter is presently before the Court because the State parties filed, on May 2, 1977, a Joint Motion for a Determination of Present Perfected Rights and the Entry of a Supplemental Decree (hereinafter referred to as the "Joint Motion of May 2, 1977").

That Motion was made pursuant to Article VI of the Court's 1964 Decree in this lawsuit, and the current proceedings are limited to a determination of present perfected rights under Article VI.

Article VI is a vehicle for determination of non-Indian present perfected rights and only for a listing according to State of use of already-determined Indian present perfected rights. Indian rights were determined by this Court in its 1964 Decree, and any claims to additional Indian present perfected rights are to be determined not under Article VI, but under either Article II or Article IX. The current proceedings are thus not the proper place for applicants, or for the United States acting as their legal representative, to assert additional claims.

The existing parties, including the United States, are attempting to resolve matters under Article VI through a Supplemental Decree agreed upon by all the parties. The Joint Motion of May 2, 1977, together with the Response to it filed by the United States in November 1977, have given hope that such a resolution short of litigation is possible. The Proposed Supplemental Decree offered by the State parties in May 1977, together with modifications suggested by the United States in its Response, contain subordination language that will protect Indian present perfected rights against any possibility of prejudice by allegedly spurious non-Indian rights. The State parties deny that any of their claims are spurious, but contend that, in any case, the applicant Indian Tribes have no valid interest in challenging them.

The applicants are seeking to intervene at the end of a long negotiation process in which they have been

more than adequately represented. Their intervention would only prolong the proceedings under Article VI and would make inevitable litigation that could otherwise be avoided. The State parties believe that the only purpose of applicants' attempt to intervene is to assert rights not appropriately assertable in this proceeding under Article VI and to challenge non-Indian rights that would not prejudice them anyway.

Intervention should be denied and the existing parties should be allowed to continue attempts at meeting the Court's Article VI mandate.

II

THE MOTION FOR LEAVE TO INTERVENE SHOULD BE DENIED SINCE THE GRANT OF INTERVENTION WOULD AUTHORIZE A SUIT BY THE APPLICANT INDIAN TRIBES AGAINST THE STATES OF ARIZONA, CALIFORNIA, AND NEVADA WITHOUT THEIR CONSENT.

States of the Union are immune from suit in the federal courts without their consent except where that immunity has been surrendered by the adoption of the Constitution of the United States. There has been such a surrender of immunity by the states with respect to original actions in the Supreme Court only (1) by one state against another and (2) by the United States against a state. (*Principality of Monaco v. Mississippi* (1934) 292 U.S. 313; *Duhne v. New Jersey* (1920) 251 U.S. 311; *Smith v. Reeves* (1900) 178 U.S. 436; *Hans v. Louisiana* (1890) 134 U.S. 1.)

Since there has been no such surrender of immunity with respect to suits against a state by individual Indians or by Indian tribes, the sovereign immunity of the states extends to suits by Indians and Indian tribes.

(*United States v. Minnesota* (1926) 270 U.S. 181, 193; *Cherokee Nation v. Georgia* (1831) 30 U.S. (5 Pet.) 1; *cf. Skokomish Indian Tribe v. France* (9th Cir. 1959) 269 F.2d 555, 560-562.)

The Chemehuevi and Fort Yuma Indian Reservations are located in California. Such immunity exists as against the Chemehuevi and Quechan Indian Tribes whether they are regarded as citizens of California or not. If they are regarded as citizens of the State of California, this Court is without jurisdiction to entertain their suit against California because the judicial power of the federal courts does not extend to a suit brought against a state without its consent by its own citizens. (*Hans v. Louisiana* (1890) 134 U.S. 1.) They would also be barred from suit against the States of Arizona and Nevada by the Eleventh Amendment of the Constitution, which provides that "the Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state . . ." (*See Ford Motor Co. v. Treasury Department* (1945) 323 U.S. 459, 464.) On the other hand, if the Chemehuevi and Quechan Tribes are not regarded as being citizens of any state, then they may not prosecute a suit against Arizona, California, or Nevada because the "States of the Union, still possessing attributes of sovereignty, . . . [are] immune from suits, without their consent, save where there has been 'a surrender of this immunity in the plan of the' " Constitution. (*Principality of Monaco v. Mississippi* (1934) 292 U.S. 313, 322-323) (quoting from The Federalist No. 81 (Hamilton).) No such surrender has been made respecting suits in the federal courts by Indian Tribes.

The same rules bar suit by the Fort Mojave Indian Tribe even though the Fort Mojave Indian Reservation is located in Arizona, California, and Nevada. If it is deemed a citizen of no state, then it may not sue any of them under the *Principality of Monaco* rule. If it is deemed a citizen of all three states, it may not sue any of them under the *Hans* rule. If it is deemed a citizen of one or two states but not all three, it may not sue the states of which it is a citizen under *Hans* and may not sue the states of which it is not a citizen under the Eleventh Amendment and *Ford Motor* rule.

It is clear that intervention by the applicant Indian Tribes would constitute a suit against the States of Arizona, California, and Nevada. Whether or not a suit is one against a state is not to be determined by niceties of the law of parties but by the actual effect a judgment in favor of the applicants would have against the states. "[T]he nature of a suit as one against the state is to be determined by the essential nature and effect of the proceeding. *Ex Parte Ayers,* 123 U.S. 443, 490-99; *Ex Parte New York,* 256 U.S. 490, 500; *Worcester County Trust Co. v. Riley,* 302 U.S. 292, 296-98." (*Ford Motor Co. v. Treasury Department* (1945) 323 U.S. 459, 464.)

Apart from any claims of their own, applicants deny the validity of the major non-Indian present perfected rights claims. (Applicants' Motion, p. 17.) In so doing, they seek a judgment that would be contrary to the interests *parens patriae* of both Arizona and California on behalf of non-Indian present perfected rights claims in their respective states. Furthermore, as to their own claims to additional present perfected rights above

those quantified in the 1964 Decree, applicants seek a judgment that would be contrary to the interests of Nevada as well as Arizona and California. Some of the additional claims are for present perfected rights to the use of water in California. These claims would be contrary to the interests *parens patriae* of both Arizona and Nevada since in times of extreme shortage, there would be more, high priority claims for use of water in California. Similarly, additional claims for use of water in Arizona are contrary to the interests of California and Nevada, and additional claims for use of water in Nevada are contrary to the interests of Arizona and California.

It is clear that applicants seek a judgment that would be contrary to the respective interests of Arizona, California, and Nevada. The intervention sought would therefore constitute a suit against those states without their necessary consent, which they decline to give. Intervention should therefore be denied.

III

THE MOTION FOR LEAVE TO INTERVENE SHOULD BE DENIED FOR THE FURTHER REASON THAT THE APPLICANT INDIAN TRIBES DO NOT MEET THE REQUIREMENTS FOR INTERVENTION AS A MATTER OF RIGHT OR FOR PERMISSIVE INTERVENTION.

Even if consent of the States of Arizona, California, and Nevada were not a bar, the applicant Indian Tribes would have to meet certain requirements in order to intervene. The Supreme Court Rules do not address intervention, but Rule 9 applies to matters of original jurisdiction, such as this lawsuit. Section 2 of Rule 9 provides:

> "The form of pleadings and motions in original actions shall be governed, so far as may be, by the Federal Rules of Civil Procedure, and in other respects those rules, where their application is appropriate, may be taken as a guide to procedure in original actions in this court."

Rule 24 of the Federal Rules of Civil Procedure (FRCP) concerns intervention, and there would seem to be nothing in this action which would render inappropriate its application to applicants' motion.

A. Applicants Do Not Have a Right to Intervene Under FRCP 24(a).

Section (a) of FRCP 24 deals with intervention as a matter of right and allows it, upon timely application, (1) in cases where a United States statute confers an unconditional right to intervene and (2) in other cases where certain requirements are met. Subsection (1) is not applicable to this case. Subsection (2) allows intervention

> "When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

Rule 24(a)(2) thus establishes four requirements, all of which must be met. The application for intervention must:

(1) be timely;

(2) show an interest in the subject matter of the action;

(3) show that as a practical matter, protection of that interest may be impaired by disposition; and

(4) show that the interest is not adequately represented by an existing party.

3 B. Moore's Federal Practice 24-284-24-285; *Nuesse v. Camp* (D.C. Cir. 1967), 385 F.2d 694. The State parties contend that the Indian Tribes' application does not meet all the requirements and, in fact, may not meet any of them.

1. The Indian Tribes' Application Is Not Timely.

This case was initiated by the State of Arizona in 1952. The United States was granted intervention in 1953 (344 U.S. 919). The matter was subsequently referred to and tried by a Master who reported his findings, conclusions, and recommendations to this Court in 1961. After hearing argument, this Court issued its Opinion in 1963 (373 U.S. 546) and Decree in 1964 (376 U.S. 340). Since then, the parties have been endeavoring to carry out the mandate of Article VI of that Decree, regarding present perfected rights.

The United States has represented the applicant Indian Tribes in all aspects of this matter since 1953 and at no previous time during that twenty-five year period have the applicant Indian Tribes applied to this Court to intervene. The States parties are aware that the mere passage of time alone does not necessarily determine timeliness, but raise the question of how any application for intervention, on whatever grounds, could be considered timely at this juncture.

When we look at the specific challenges made in the application, the lack of timeliness becomes even

more obvious. The applicants contend that the major non-Indian present perfected rights claims in Arizona and California are spurious and yet all these claims were made in lists filed by the respective states with this Court in March 1967. These claims and priority dates have been known to the applicants for nearly eleven years and yet have not been challenged. In fact, the total number of acre-feet in the challenged claims is less in the Proposed Supplemental Decree than it was in the original list. If any or all of these claims are spurious, therefore, the applicants have been on notice since 1967.

The applicants also contend that the United States has wrongfully failed to assert Indian present perfected rights claims for areas involved in boundary disputes and yet the United States also filed its list of present perfected rights claims in March 1967. That list, similar to the Proposed Supplemental Decree, did not assert claims for the disputed areas. Those disputes were known at that time, and applicants have thus been on notice of the United States position since 1967.

During the eleven years since the respective parties filed lists of present perfected rights claims, they have attempted to reach agreement on a supplemental decree containing these claims. Several years of this time were spent examining and challenging respective claims and priority dates until agreement was reached as to the validity, quantity, and priority dates of the claims. That process concluded in 1971 as to the major claims and in 1973 as to the miscellaneous claims. At no time during that period or until the filing of this motion have the applicants brought their challenges before this Court despite being on notice since 1967.

Finally, the applicants contend that the United States has wrongfully failed to assert Indian present perfected rights claims to acreage alleged to have been mistakenly excluded from calculations of irrigable acreage made in the Court's 1964 Decree. Aside from the *res judicata* question (to be discussed later), the applicants have been on notice since 1964 that the Decree excluded this acreage and were on notice long before that of the United States' decision not to assert claims for all this acreage at the trial before the Master. Applicants surely were on notice long before the August 13, 1975 Memorandum they refer to (Applicants' Brief p. 29), and even that memorandum was written two and one-half years ago, during which time the applicants made no application to this Court while the parties continued to work toward an agreement on present perfected rights.

2. The Indian Tribes Have No Remaining Interest in the Proceedings Under Article VI.

The State parties agree that the applicant Indian Tribes have an interest in the *Arizona v. California* lawsuit. These three Tribes already have present perfected rights under the 1964 Decree and are making additional claims. Nevertheless, the only matter presently before the Court is Article VI of that Decree, and that Article only contemplates the determination of non-Indian present perfected rights.

As the State parties have already argued in the Joint Motion of May 2, 1977 (at pp. 27-28), Article VI only requires the listing of Indian present perfected rights *already quantified* in Article II(D)(1)-(5) of the Decree. The purpose of this requirement is to divide these rights according to the state in which

they are to be exercised, but does not affect the total quantity of rights already decreed. Article VI certainly did not contemplate the claim of *additional* present perfected rights for the Indian Tribes when their rights had just been fully litigated and quantified in the Decree. This is particularly obvious in view of the short, two year period the Court allowed for submission of lists. Article VI did not have in mind the litigation of boundary disputes or the relitigation of irrigable acreage calculations so as to give rise to additional present perfected rights to be included in the United States' list.

Since determination of Indian Tribe rights is not the subject of Article VI, the applicants have no direct interest in the present matter. Their only potential interest is indirect to the extent that the quantity and priority dates of non-Indian present perfected rights could affect the amount of water applicants would receive in time of extreme water supply shortage. However, this interest is addressed by subordination language (to be discussed later) that allows Indian Tribe rights to be satisfied ahead of all major non-Indian rights, those very rights that applicants now challenge as spurious. Thus, it is difficult to see what remaining interest, even an indirect one, applicants have in the matter now before the Court.

3. Even if Applicants Have an Interest, It Cannot Be Said as a Practical Matter That This Interest Might Be Impaired by Entry of a Supplemental Decree.

If this requirement is construed to mean no more than that the applicants must be bound *res judicata* to a Supplemental Decree entered under Article VI, then applicants meet the requirement. As the United

States Solicitor General has noted in his letter to Ms. Veronica L. Murdock (Applicants' Motion, Appendix A), applicants will be bound by any decree entered by this Court that applies to the United States as a party. *Pueblo of Picuris v. Abeyta* (10th Cir. 1931) 50 F.2d 12.

Nevertheless, it cannot be said as a practical matter that protection of the applicants' interest or the interest itself might be impaired by entry of a Supplemental Decree with subordination language. As we will soon show, no Indian Tribe right, either decreed or claimed, will be impaired by entry of said Supplemental Decree; nor will the ability to assert and protect said rights be impaired.

4. Whatever Interest Applicants Have Is Being Adequately Represented by an Existing Party, the United States.

Even if the first three requirements are satisfied, the right to intervene does not lie if the applicants are adequately represented by an existing party. Applicants may not have the burden of proof on this issue, but in the present matter the evidence is conclusive that they are more than adequately represented by an existing party, the United States.

Legal representation of Indian Tribes by the United States is an aspect of the plenary power of the United States to manage the affairs of Indians and Indian Tribes. *Worcester v. Georgia* (1832) 6 Pet. 515; *United States v. Kayama* (1886) 118 U.S. 375; *United States v. Ramsey* (1926) 271 U.S. 467. This Court recognized the complete control of the United States over Indian litigation in *Heckman v. United States* (1912) 224 U.S. 413 at 444-445:

> "There can be no more complete representation than that on the part of the United States in acting on behalf of these dependents—whom Congress, with respect to the restricted lands, has not yet released from tutelage. Its efficacy does not depend upon the Indians' acquiescence."

Whether representation of applicants' interest is inadequate due to a conflict of interest is, at best, a theoretical argument only. As a practical matter, the United States has represented applicants' interest without qualification throughout this lawsuit. In discussing the adequacy of United States' representation, the State parties cannot presume to know the legal judgments, strategy, and tactics used by the United States in representing the applicants' interest. The State parties can, however, attest to the general conduct of the litigation and to the results of that conduct.

Throughout this lawsuit, the United States has strongly espoused the Indian Tribes' interest. The Court's 1963 Opinion and 1964 Decree reflected this advocacy in a decision considered by all the State parties as well as the applicants (Applicants' Brief p. 2) to be favorable to the Tribes. The Court reaffirmed the *Winters* doctrine of reserved water rights and awarded the five Lower Colorado River Indian Tribes water rights to approximately 900,000 acre-feet of annual diversions, even though much of this quantity had never been put to use.

In the post-1964 developments under Article VI of the Decree, the United States has continuously taken positions in support of the interest of the Tribes. The State parties are convinced, in fact, that failure to reach a final agreement under Article VI in the five

years since 1973, when agreement was reached on individual claims, has been due largely to demands made by the United States on behalf of the Tribes. As noted in the Joint Motion of May 2, 1977, the State parties contend that some of these demands have been excessive and beyond the scope of Article VI. Certainly, such a record belies any claim of inadequate representation.

Beyond the general conduct and results so far, we must look to the product of United States representation under Article VI. As noted earlier, that is the only matter presently before this Court, and the State parties contend that the right to intervene must be determined within the scope of Article VI, the applicants' real interest or lack thereof in it, and the adequacy of representation with regard to it. The State parties contend that representation as to all aspects of the lawsuit is adequate but for purposes of this Motion need only be examined with respect to Article VI.

The Proposed Supplemental Decree, together with modifications suggested by the United States in its Response of November 1977, adequately protects applicants' interest.[1] First, the fact that it does *not* attempt to list and resolve claims to additional present perfected rights for Indian Tribes is appropriate and consistent with Article VI. As argued, *supra,* Article VI does not contemplate listing and resolving such claims. In 1964, this Court had just completed calculation of irrigable acreage in the Opinion and Decree. It had

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[1]While the States parties have not yet reached complete agreement with the United States as to all the suggested modifications, the areas of difference are narrowing, and the State parties are hopeful of a rapid resolution.

also just decided *not* to rule at that time on boundary disputes concerning the Colorado River and Fort Mojave Indian Reservations (373 U.S. 546, at 601) but had provided in Article II (D)(5) of the Decree for adjustment of the decreed rights of those reservations in the event that the disputes were settled. In view of this, it is illogical to suppose that this Court then turned around and contemplated either recalculation of irrigable acreage or resolution of boundary disputes within its two year mandate under Article VI. This becomes even clearer in view of Article IX in which this Court gave all parties the broad right to seek modification of the Decree. Article IX provides:

> "Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy."

If recalculation of irrigable acreage were ever appropriate, then Article IX would be the proper vehicle, not Article VI. Whenever it became appropriate to resolve the present perfected rights associated with boundary disputes on any of the five Reservations, then Article II or Article IX would also be the proper vehicle, not Article VI.

The Proposed Supplemental Decree together with suggested modifications, does not affect applicants' interest under Articles II(D)(5) and IX. It is, in fact, explicit on this point:

> "(2) This determination shall in no way affect future adjustments resulting from determinations

relating to settlement of Indian reservation boundaries referred to in Article II(D)(5) of said Decree.

"(3) Article IX of said Decree is not affected by this list of present perfected rights."

So the Proposed Supplemental Decree not only neither limits nor denies any additional claims of applicants; it explicitly reaffirms the means through which those claims can be resolved.

The Proposed Supplemental Decree, together with suggested modifications, goes even further, however. As noted, *supra,* the applicants had a potential indirect interest in Article VI to the extent that the quantity and priority dates of non-Indian present perfected rights could affect the amount of water applicants would receive in the event of extreme shortage. The Proposed Supplemental Decree, with modifications, addresses this interest through subordination language that allows all Indian present perfected rights to be satisfied ahead of all major non-Indian rights in time of shortage. Applicants claim that the major non-Indian claims are spurious, but every right they claim to be spurious will be subordinated to every Indian right under the subordination language. Furthermore, the Indian rights to be so advantaged include not only those present perfected rights already quantified in the Decree, but also any present perfected rights quantified in the future as the result of boundary dispute resolutions.

The State parties deny that any of the non-Indian present perfected rights claims are spurious, whether as to property description, acreage, quantity of water right, or priority date. Nevertheless, even if the appli-

cants' allegations were true, the applicants would not be prejudiced in any way since all their rights would be satisfied ahead of any major non-Indian rights whenever there was not enough water to satisfy all present perfected rights.

In fact, as argued in the Joint Motion of May 2, 1977 (pp. 23-24, 28-30), the Indian present perfected rights are actually given a legal benefit by the subordination language. The language was designed in response to a contention that the doctrine of relation-back, on which the priority dates of non-Indian present perfected rights were based, did not apply vis-a-vis Indian reservations. The subordination language renders irrelevant any major non-Indian priority date as far as Indian rights are concerned. That said language actually confers a legal benefit is due to the fact that some of the major non-Indian present perfected rights would have earlier priority dates than those of the Indians (as decreed by this Court) even without applying the doctrine of relation back. On the other hand, even if the Indian rights were deemed to have immemorial priority dates, which the State parties deny, they would be no better off vis-a-vis the major non-Indian rights than they are under the subordination language.

The applicants claim, however, that the Proposed Supplemental Decree is ambiguous in two respects and that therefore their interest is compromised. The applicants are mistaken. First, the subordination language concerns the order in which present perfected rights are satisfied in the event that there is not even enough water available to satisfy all present perfected rights. If not all present perfected rights can be satisfied,

then the Indian rights will be satisfied first. If there is enough water to satisfy all present perfected rights, but not enough to satisfy 7,500,000 acre-feet, then it does not matter *which* present perfected rights are satisfied first, since there is enough water to satisfy all of them and they all have a priority over non-present perfected rights under the Decree. There is no ambiguity and applicants' interest is protected.

Second, the Proposed Supplemental Decree provides that as to additional rights for enlarged reservation boundaries,

> "mainstream water shall not exceed the quantities necessary to supply the consumptive use required for irrigation of practicably irrigable acreage. . . ."

Article II (D)(1)-(5) of the Decree lists Indian present perfected rights in terms of a dual limitation, *either* a quantified number of acre-feet of diversions, *or* the quantity of water necessary to supply consumptive use required for irrigation of a quantified number of acres and satisfaction of related uses, *whichever is less.* Since this is a dual limitation, the right cannot be greater than either alternative, and therefore the Proposed Supplemental Decree accurately states that it cannot exceed the quantity of water necessary to supply consumptive use. The Proposed Supplemental Decree does not include a quantified number of acres, however, because the number of irrigable acres, which was calculated in the 1964 Decree, remains to be determined as to additional areas due to enlarged boundaries. The term "practicably irrigable acres" thus is substituted for an actual number of acres and sets the same standard for the calculation of irrigable acres as was used by

the Master for the reservation boundaries in the 1964 Decree.

The evidence is indeeed conclusive that whatever interest applicants have in the present matter under Article VI is being adequately represented by the United States. The Proposed Supplemental Decree, together with suggested modifications, properly includes only those Indian present perfected rights already decreed by this Court. However, it does not in any way deny or prejudice any Indian claims to additional present perfected rights and explicitly reaffirms the proper means to assert those rights. It eliminates any prejudicial potential of allegedly spurious non-Indian present perfected rights through effective and unambiguous subordination language which actually confers a legal benefit on applicants' interest. The test of adequate representation cannot be merely whether applicants get everything they want. The fact is that they are getting at least as much, if not more, than they could reasonably expect out of Article VI and that the United States has continuously and effectively espoused their interest in this matter.

The State parties conclude that applicants have certainly not met all four requirements, if any, for intervention as a matter of right under Federal Rule 24(a)(2). Applicants' attempt to raise the issue of judicial economy as a reason for granting intervention (Applicants' Motion, p. 4) is not persuasive. In deciding the right to intervene, this Court may possibly consider the possible economy of resolving several conflicts in one proceeding through intervention. 3 B. Moore's Federal Practice 24-285. In this instance, however, there would not be economy, but rather more litigation.

Allowing intervention in the Article VI proceedings would likely preclude any chance of resolving non-Indian present perfected rights short of full litigation. The applicants would apparently challenge all non-Indian claims in spite of effective subordination language (Applicants' Brief, p. 14). Thus, there would be needless litigation over non-Indian rights in addition to litigation over additional Indian claims.

B. Applicants Do Not Qualify for Permissive Intervention Under FRCP 24(b).

Section (b) of FRCP 24 deals with permissive intervention and allows it, upon timely application (1) in cases where a statute of the United States confers a conditional right to intervene and (2) in cases where an applicant's claim or defense and the main action have a question of law or fact in common. Subsection (1) is not applicable to this case. Subsection (2) may be, but even if it is, the Court in the exercise of its discretion is mandated to

> "Consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

Rule 24(b)(2) thus establishes three requirements for permissive intervention. The application for intervention must:

(1) be timely;

(2) assert a claim or defense that has a question of law or fact in common with the action before the Court; and

(3) show that intervention will not cause undue delay or prejudice.

1. The Indian Tribes' Application Is Not Timely.

As argued, *supra,* under the discussion on intervention as a matter of right, the application is not timely. This is even more obvious regarding permissive intervention where delay and prejudicial effect is an explicit factor to be considered by this Court.

2. There Are No Actual Questions of Law or Fact Common to Both the Application and the Matter Presently Before This Court.

The only matter presently before this Court is Article VI of the Decree, and that Article only contemplates the determination of non-Indian present perfected rights. Applicants' concern with additional Indian rights raises different questions of fact than those before the Court. Also, Indian present perfected rights have a different legal basis than non-Indian rights in that they are based on the *Winters* doctrine of reserved rights and do not depend on prior use, as do non-Indian rights. Thus, there are different questions of law.

3. Intervention Would Unduly Delay and Prejudice the Adjudication of the Rights of the State Parties.

As noted earlier, applicants' intervention in the Article VI proceedings would likely preclude any chance of resolving non-Indian present perfected rights short of full litigation. This would obviously delay resolution under Article VI and would constitute undue delay since the applicants have no interest in the non-Indian claims because of subordination language that fully protects them.

Furthermore, intervention would prejudice the State parties. They would not only be delayed in obtaining their decreed rights under Article VI but would be

forced into the wholly needless expenditure of time and money to prove those rights in court and defend the claims against applicants' denials. The State parties have waited fourteen years to get their present perfected rights decreed and have already gone through the process of having their respective claims carefully scrutinized by the other parties. The claims that survived this examination are only those which all parties, including the United States, agreed were valid. To subject these claims to another test would be needless, time-consuming, and unfair, and would, in no event, result in the applicants' interest being any more advantaged than it would be already under the subordination language.

The State parties therefore contend that applicants do not meet the requirements for permissive intervention, and that in any case, no valid grounds exist upon which this Court should exercise its discretion to allow intervention.

C. Applicants May Not Have Complied With the Procedural Requirements of FRCP 24(c); if They Are Given More Time to Comply, the State Parties Should Be Given Adequate Time for an Additional Response.

Section (c) of FRCP 24 requires that a person desiring to intervene shall serve a motion upon the parties and that

> "[T]he motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought."

Applicants have filed a document entitled "Motion" and another entitled "Brief" but there is no separate

pleading, such as a petition or complaint in intervention, that accompanies the motion. Whether applicants have met the requirements of Rule 24(c) by the contents of their motion is apparently uncertain to them in view of their request for an additional sixty (60) days to file a "full petition in intervention." (Applicants' Motion, p. 3.)

The State parties doubt whether applicants have complied with Rule 24(c). However, if this Court allows them sixty (60) days additional to rectify this defective filing, the State parties would request an appropriate time thereafter within which to file an additional response.

IV

ANY CLAIMS OF APPLICANTS, NOT BARRED BY RES JUDICATA, TO ADDITIONAL PRESENT PERFECTED RIGHTS CAN BE RESOLVED IN SEPARATE PROCEEDINGS UNDER THE 1964 DECREE.

A. Res Judicata Bars Any Recalculation of Irrigable Acreage Within the 1964 Reservation Boundaries.

As argued, *supra,* Article IX would be the appropriate vehicle for seeking recalculation of irrigable acreage, if such recalculation were appropriate. The State parties contend, however, that it is not. The number of irrigable acres within the Indian Reservation boundaries, as they existed in 1964, was fully tried before the Master and this Court and the five Lower Colorado River Indian Tribes were adequately represented throughout by the United States. The Court determined the number of irrigable acres within each Reservation boundary, and the result was a total of approximately 900,000 acre-feet in present perfected rights, an out-

come favorable to the Tribes. The State parties contend, therefore, that the elements of *res judicata* exist and bar relitigation of this issue.

B. Present Perfected Rights Claims Associated With Boundary Disputes Can Be Resolved Under Article II and/or Article IX.

As argued, *supra*, Articles II and/or IX are the proper vehicles for resolving present perfected rights associated with Reservation boundary disputes. In contrast to the recalculation of irrigable acreage, however, these matters were not determined by this Court in its 1964 Decree, and therefore *res judicata* is no bar to their resolution in the future.

The State parties disagree with applicants' interpretation of which, if any, boundary disputes have been finally determined. Whether several of the lower court decisions applicants refer to constitute final boundary determinations for purposes of asserting present perfected rights depends on the issues that were necessarily resolved by those decisions.

The State parties object, however, to any assertions that orders of the Secretary of the Interior finally determine Indian Reservation boundaries. Secretarial Orders are functional for Department of Interior administrative purposes, but not for purposes of use as the bases for asserting water rights which impinge on those of the State parties. The State parties are entitled to a court determination of the validity of Reservation boundary claims recognized by Secretarial Orders.

The same reasoning applies to the Opinion of Interior Solicitor Austin, M-36886 (January 18, 1977),

which reaffirmed the Opinion of Solicitor Margold, M-28198 (January 8, 1936), deciding the Fort Yuma Indian Reservation boundary dispute adversely to the Quechan Indians' claim. Applicants neglect to mention the Austin Opinion (Applicants' Motion, p. 15), implying instead that the Solicitor's office at Interior had not resolved the question. The State parties recognize, however, that even though Solicitor Austin did issue the Opinion, that it did not constitute a final determination of the dispute.

Conclusion.

For the reasons discussed above, applicants' Motion for Leave to Intervene as Indispensable Parties should be denied and the existing parties should be allowed to continue attempts to meet the mandate of Article VI of the 1964 Decree. If applicants are allowed time to file additional pleadings in support of intervention, the State parties should be allowed an appropriate time within which to file an additional response.

DATED: January 25, 1978.

Respectfully submitted,

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Service of the within and receipt of a copy thereof is hereby admitted this ..... day of January, A.D. 1978.
